



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 11, 2003

Mr. Kuruvilla Oommen
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR2003-1600

Dear Mr. Oommen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176932.

The City of Houston (the "city") received a request for information related to a named city council member. You assert that the submitted information is excepted from disclosure under sections 552.103 and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative samples of information.

Section 552.301(e)(1)(D) of the Government Code provides that a governmental body must submit a copy of the specific information requested, or submit representative samples of the information if a voluminous amount of information was requested. You state that "[s]ince the responsive documents are voluminous, the City has enclosed a representative sample" We note, however, that you have not submitted any information responsive to certain categories of the request, such as categories 2, 14, 17, 18, 22, and 25 through 30.² If each requested category contains substantially different types of information, you must submit to this office samples of all of the categories of information. See Open Records Decision No. 499 (1988), 497 (1988). Based on our review of the submitted information and the request, we conclude that the submitted information is not truly representative of the requested information as a whole.

¹Section 552.136, which you cite in your December 16, 2002 letter, is identical to section 552.137.

²We were unable to determine with the city whether the city has responsive information substantially different from the submitted information.

To the extent the city holds information that is responsive to the request but that is not represented by the submitted samples, the city has failed to comply with section 552.301(e)(1)(D) of the Government Code. Accordingly, such information is "presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." See Gov't Code § 552.302. Normally, a compelling reason is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 at 2 (1977). You claim that the requested information is excepted from disclosure under sections 552.103 and 552.137 of the Government Code. Section 552.103 is a discretionary exception under the Public Information Act and does not demonstrate a compelling reason to withhold information from the public. See, e.g., *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.— Dallas 1999, no pet.) (governmental body may waive section 552.103). See also Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103), 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential), 473 at 2 (1987) (failure to meet 10-day deadline waived protections of sections 552.103 and 552.111). Thus, the city may not withhold information of which we did not receive representative samples under section 552.103. Moreover, because you have not submitted the specific information requested, we have no basis for finding it confidential under section 552.137. Thus, we have no choice but to order the release of any responsive information that is substantially different from the submitted information, to the extent it exists, per section 552.302 of the Government Code. If you believe any such information is confidential and may not lawfully be released, you must challenge this decision in court as outlined below.

Additionally, we note that the submitted documents include information that is subject to section 552.022. Section 552.022(a) provides that certain "categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law[.]" See Gov't Code § 552.022(a). Some of the submitted information, which we have marked, is expressly public under section 552.022(a). Therefore, you may only withhold this information if it is confidential under other law. You argue that this information is confidential under section 552.103. However, section 552.103 of the Government Code is a discretionary exception and therefore is not "other law" for purposes of section 552.022.³ Accordingly, you must release to the requestor the information we have flagged under section 552.022(a).

We turn now to your claimed exceptions. You claim that information responsive to the request is excepted from disclosure under section 552.103. Section 552.103 provides in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the

³See *Dallas Area Rapid Transit*, 4 S.W.3d 469. See also ORDs 665, 551, 473.

state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code, § 552.103(a),(c). The city maintains the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the governmental body receives the request for information and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990); Gov't Code § 552.103(c). The city must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

In this case, you state that the city has received three letters from the requestor that indicate that the requestor intends to bring a lawsuit against the city. You have also provided an affidavit from an Assistant City Attorney in the city's Legal Department's Business Litigation Division wherein the attorney states that the city reasonably anticipated litigation on the date of the request, and that the submitted information is directly related to the litigation. We note that the city received one of the letters at issue the day after it received

the request for information. The city may not rely on information received on a date subsequent to an information request to establish that it reasonably anticipated litigation *on the date* it received the information request. *See University of Tex. Law Sch.*, 958 S.W.2d at 481. Nevertheless, based on the remaining letters, we agree that you have shown that the city reasonably anticipated litigation on the date it received the request for information. *See* Open Records Decision No. 638 (1996). Furthermore, we find that the requested information relates to the anticipated litigation. Thus, the city may withhold the information from disclosure under section 552.103, with the following exceptions.

Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). As we resolve your request under section 552.103, we need not consider your section 552.137 claim.

In summary, you must release any responsive information that is substantially different from the submitted information, to the extent it exists, in accordance with section 552.302. You must also release to the requestor the information we have flagged under section 552.022(a). You may withhold the remaining submitted information from disclosure based on section 552.103.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

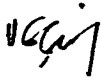
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/seg

Ref: ID# 176932

Enc: Submitted documents

c: Mr. Edward F. Fernandes
Brobeck, Phleger & Harrison, L.L.P.
4801 Plaza on the Lake
Austin, Texas 78746
(w/o enclosures)